No. 91-1326

In The

Supreme Court of the United States

OCTOBER TERM, 1991

THE DISTRICT OF COLUMBIA
AND SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The District of Columbia replies to the brief in opposition by the Greater Washington Board of Trade. This reply also addresses the brief of the Connecticut Business and Industry Association ("CBIA"), as *amicus curiae*.

The District agrees with the Board of Trade that this case may be summarily disposed of on the merits. It involves only a single legal issue: whether this Court meant what it said when it unanimously ruled in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), that state laws, such as disability insurance and workers' compensation laws, are not preempted by ERISA so long as these laws permit employers to furnish state-mandated employee benefits by establishing plans separate from their ERISA-covered plans. The District also

agrees with the CBIA that review is proper now. There is a square conflict between the Second and the District of Columbia Circuits over the meaning of an important provision of an important federal law. In addition, the recent trend of the States to set state-mandated employee benefits by reference to benefits provided in ERISA-covered employee benefit plans favors resolving the Circuit conflict before it widens. However, for the reasons set forth in the District's petition and in this reply, this Court should reverse the decision below.[1]

ARGUMENT

I. THE BOARD OF TRADE IGNORES THE LANGUAGE AND STRUCTURE OF ERISA AND CONGRESS' PLAIN PURPOSE TO PRESERVE STATE DISABILITY INSURANCE, WORKERS' COMPENSATION, AND UNEMPLOYMENT COMPENSATION LAWS.

The Board of Trade urges that ERISA preemption in this case depends on a one-step inquiry — whether a state law "relates to" an ERISA-covered employee benefit plan. Opp. at 7-8. If a state law does not relate to such a plan, it is not preempted; and if a state law relates to such a plan, it is preempted. Thus, in the Board of Trade's view, ERISA treats workers' compensation, disability insurance, and unemployment compensation laws like all other state laws, except for laws governing insurance, banking, and securities.

This approach is flawed. First, it ignores the oft-stated principle, applicable even in ERISA cases, that "the exercise of federal supremacy is not lightly to be presumed" and that "[p]reemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so

[1] Because the single legal issue in this case has been fully briefed, summary reversal may be appropriate. If, however, this Court should conclude that it wishes further briefing and argument, the petition should be granted for those purposes.

ordained." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981) (internal quotation marks omitted). *Accord Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (courts "must presume that Congress did not intend to pre-empt areas of traditional state regulation").

Second, the Board of Trade's approach contradicts the language and structure of ERISA, which plainly reveals Congress' purpose to treat state workers' compensation, unemployment compensation, and disability insurance laws differently from laws not singled out for special treatment. In the case of state laws not expressly mentioned in ERISA, this Court has adopted a one-step approach. Such a law is preempted unless it bears such a tenuous relationship to employee benefit plans subject to ERISA that it is not reasonable to conclude that the law "relates to" such plans.[2]

Such a one-step inquiry, however, is improper in the case of state statutes, such as workers' compensation or disability insurance statutes, because an inquiry so limited renders meaningless ERISA's provisions specifically addressing the validity of such statutes.[3] Thus, under such a one-step approach, if such statutes do not "relate to" an ERISA-covered plan, they are outside of ERISA's scope without regard to ERISA's provisions specifically addressing the

[2] *See, e.g., Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990) (ERISA preempts state common law claims for wrongful discharge effected by employer in order to prevent its employees from becoming vested under an ERISA-covered pension benefit plan because such state law claims plainly "relate to" an ERISA-covered plan but also, just as plainly, are not subject to an ERISA exemption from preemption); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) (ERISA does not preempt application of general state garnishment statutes to benefits paid pursuant to employee welfare benefit plans covered by ERISA because relationship of such statutes to ERISA-covered plans is too tenuous, but ERISA does preempt exemption from general garnishment statutes for benefits paid pursuant to such plans).

[3] This Court is bound to give effect to an entire congressional enactment. *See, e.g., Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

validity of such statutes. On the other hand, if such statutes do "relate to" ERISA-covered plans, they are preempted for that reason alone. Under the approach of the Board of Trade, therefore, the provisions of ERISA specifically addressing the validity of workers' compensation, unemployment compensation, and disability insurance statutes are simply irrelevant.

To give effect to these provisions requires a two-part inquiry. The first part asks whether such a law "relates to" ERISA-covered employee benefit plans. The answer to this question is almost always, if not always, going to be affirmative. This is because there is a substantial overlap between employee benefit plans subject to ERISA and state-mandated employee benefits pursuant to workers' compensation, unemployment compensation, and disability insurance laws. Thus, ERISA broadly defines employee benefit plans subject to its coverage as plans providing for medical and similar benefits or for "benefits in the event of sickness, accident, disability, death or unemployment . . .." ERISA § (3)(1), 29 U.S.C. § 1002(1). Furthermore, state workers' compensation and similar laws necessarily confer benefits included within this broad definition.

As a consequence, as this Court recognized in *Shaw*, because it is plain that Congress did not intend to bar such state laws, preemption is not proper simply because such state laws "relate to" ERISA-covered plans. Instead, there must be an additional inquiry — whether the benefits required by state law can be provided in a plan separate from an employer's ERISA-covered plan. In *Shaw*, the state disability insurance law permitted such a separate plan and thus was not preempted to that extent. Similarly, the District's Equity Amendment Act, D.C. Code Ann. § 36-307(a-1) (1991 supp.), permits such a separate plan and should simiarly be found valid.

II. THE DISABILITY INSURANCE LAW IN *SHAW* "RELATED TO" ERISA-COVERED PLANS.

The Board of Trade and the CBIA assert that the disability benefits law in *Shaw* did not relate to, that is, did not have

a connection with or reference to an ERISA-covered plan. Opp. at 7; CBIA Brief at 4. Similarly, they both assert that the District's Equity Amendment Act is legally different from the disability insurance law in *Shaw* because the existence and level of benefits provided to injured workers in the District are set by reference to benefits provided in an employer's ERISA-covered plan for non-injured workers. Opp. at 8; CBIA Brief at 2, 8-9.

These assertions are wrong. First, this Court held in *Shaw* that the state disability benefits law "related to" ERISA-covered plans. See Cert. Pet. at 10-14. Indeed, the fact that the law in *Shaw* related to ERISA-covered plans was underscored by this Court's ruling that employers could comply with the state law by including the state-mandated benefits in their ERISA-covered plans. Second, once a state law has been found to "relate to"an ERISA-covered plan, this Court has drawn only one distinction based on the degree to which a statute relates to an ERISA-covered plan. In the case of a favored statute, such as a state disability insurance or workers' compensation law, it is not preempted so long as an employer can comply with its terms by establishing an employee benefit plan separate from its ERISA-covered plan. See Cert. Pet. at 11-14. *Compare Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom., Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983), discussed in CBIA Brief at 10 n. 8 and in Cert. Pet. at 16 n.6 & 18.

III. THE CONCEDEDLY PERMISSIBLE WORKERS' COMPENSATION LAWS REQUIRING EMPLOYERS TO PROVIDE HEALTH INSURANCE BENEFITS TO INJURED WORKERS ARE LIKELY TO BE MORE BURDENSOME THAN THE DISTRICT'S EQUITY AMENDMENT ACT.

The Board of Trade concedes that the States and the District of Columbia may require employers to provide health insurance as part of workers' compensation. Opp. at 6, 9, 11. Thus, for example, the District could require employers in

the District having more than 10 employees to provide for up to 52 weeks of comprehensive health insurance for workers injured on the job. At the same time, another jurisdiction could require employers with more than 25 employees to provide, for the entire period of an employee's job-related disability, a different health insurance package. Indeed, as the Board of Trade necessarily concedes, even with ERISA, a multi-state employer properly could be subject to 50 different state workers' compensation laws providing for health insurance, as well as to a District of Columbia law. Furthermore, the health insurance benefits required by those laws could differ from the health insurance benefits employers provide to non-injured workers, and even injured workers, under their ERISA-covered plans.

The Board of Trade is correct that ERISA would not preempt such laws. Preemption is not authorized by Congress despite (1) the obvious administrative difficulties and costs faced by employers in administering 51 exempt workers' compensation plans, providing for various health insurance benefits; and (2) the obvious costs to employers in paying for such benefits in whole or in part. *See Shaw v. Delta Air Lines, Inc.*, *supra*, 463 U.S. at 89-90, 106-09; *cf. Metropolitan Life Insurance v. Co. v. Massachusetts*, *supra*, (upholding a state insurance law, despite ERISA, insofar as it applied to employers which purchase insurance to discharge their ERISA-governed obligations).

Given what the Board of Trade, and indeed the court below, concede is permitted by ERISA, there is no sound reason to attribute to Congress an intent to preempt the less intrusive and more easily administered workers' compensation law enacted by the District of Columbia. This law does not compel employers to alter their ERISA-covered plans to provide the benefits it requires. Instead, as in *Shaw*, employers are given the option of altering their ERISA-covered plans to provide such benefits, if they are not already provided, or to establish plans separate from their ERISA-covered plans to provide such benefits.

IV. ADMINISTRATIVE BURDENS.

The Board of Trade, like the court below, fails to explain how the District's Equity Amendment Act would cause *administrative* difficulties different from those that would be caused by a concededly valid workers' compensation law requiring health insurance. However, the CBIA *amicus* brief suggests: "Employers who change their ERISA plans face the administrative burdens of tracking subclasses of employees whose benefit levels were set based on the plan in effect when they first became eligible to receive workers' compensation." CBIA Brief at 2; see also *id.* at 7.

This argument does not withstand scrutiny. First, employers may face the same "tracking" problems whenever concededly valid workers' compensation laws requiring health insurance benefits are amended. Second, this argument rests on the premise that ERISA's overriding purpose is to ensure that employers are subject only to a single national law in the area of employee benefit plans. See CBIA Brief at 1, 11-12. This is simply not true. The overriding purpose of ERISA is to ensure that employees secure the rights promised them by their employers. See ERISA § 2, 29 U.S.C. § 1001. Furthermore, Congress expressly allowed the States and the District of Columbia to require employers to provide employee benefits pursuant to, for example, insurance laws and workers' compensation laws. As this Court observed in *Metropolitan Life Insurance Co. v. Massachusetts*, *supra*, 471 U.S. at 747, "disuniformities [in employer obligations to provide employee benefits] . . . are the inevitable result of the congressional decision to 'save' local insurance regulation." The same observation applies with equal force to Congress' decision not to supersede all state laws governing workers' compensation and similar employee-protection laws.[4]

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[4] The District notes only one other matter, the CBIA's reference to that aspect of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. 99-272, 29 U.S.C. §§ 1161-1168, which requires employers in designated circumstances to extend health insurance cover-

[Footnote continued on next page]

CONCLUSION

This Court should grant the petition for a writ of certiorari in this case and reverse the decision of the District of Columbia Circuit.

Respectfully submitted,

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[Footnote coninued from previous page]
age to employees at the employees' own expense. CBIA Brief at 12 n.10. This provision does not support preemption here. It does not purport to affect the status of state workers' compensation laws and the like. Instead, it merely illustrates Congress' recognition of the growing importance of health insurance benefits to workers, a phenomenon which the District is also entitled to recognize in its workers' compensation law.